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No. 80-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUISIANA DAIRY STABILIZATION BOARD,
Appellant,

versus

DAIRY FRESH CORPORATION AND
DAIRY FRESH ICE CREAM CORPORATION,
Appellees.

On Appeal from the
United States Court of Appeals
For the Fifth Circuit

MOTION TO AFFIRM

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QUESTION PRESENTED

May a state regulatory body charged with the duty of stabilizing economic activities in a state's dairy market impose an assessment and a set of restrictive economic regulations on sales of dairy products made by an out-of-state processor in an out-of-state market, simply because a domestic retailer purchases these products for importation into the state?

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LOUISIANA DAIRY STABILIZATION BOARD,
Appellant,

versus

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Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

MOTION TO AFFIRM

Dairy Fresh Corporation and Dairy Fresh Ice Cream Corporation, appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed on the ground

that the question on which the decision of the cause depends is not sufficiently substantial to warrant plenary consideration.

STATEMENT OF THE CASE

1. Course of proceedings below.

This action was brought by the appellant, the Louisiana Dairy Stabilization Board ("the Dairy Stabilization Board"), for a declaration that its attempts to apply certain provisions of the Louisiana Dairy Stabilization Law ("the Dairy Stabilization Law"), La. R.S. 40:931, *et seq.*, and its regulations to the appellees, Dairy Fresh Corporation and Dairy Fresh Ice Cream Corporation (collectively "Dairy Fresh") are valid under the United States Constitution. Dairy Fresh counterclaimed for a declaration that the attempted application of the Dairy Stabilization Law and regulations violates both the Commerce Clause and the Due Process Clause of the United States Constitution. (R., 1-8; 21-28).

Following a trial, the district court entered Findings of Fact and Conclusions of Law holding that the attempts of the Dairy Stabilization Board to apply the Dairy Stabilization Law and regulations to the activities of Dairy Fresh violate the Commerce Clause. *Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp.*, 476 F.Supp. 416 (M.D. La., 1979). The district court found that the processing activities of Dairy Fresh occur out-

side the State of Louisiana and its transactions with Louisiana retailers are consummated outside the state. *Id.* at 419-20. Thereafter, the district court entered a judgment permanently enjoining the Dairy Stabilization Board from enforcing certain provisions of the Dairy Stabilization Law and regulations with respect to the activities that Dairy Fresh carries on outside of the State of Louisiana. (R., 262).

The decision was affirmed by the United States Court of Appeals for the Fifth Circuit. *Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp.*, 631 F.2d 67 (5th Cir., 1980). The court held that the attempted "application of the Louisiana Dairy Stabilization Law and regulations to these out-of-state processors based on the out-of-state sale of their products for resale in Louisiana violates the Commerce Clause of the United States Constitution . . ." *Id.* at 69.

2. Factual background.

The background of this case includes extensive prior litigation concerning the constitutionality of efforts by various Louisiana agencies to protect the economic interests of Louisiana dairy producers and processors by attempting to regulate the purchase and sale of dairy products in interstate commerce. In 1965, Schwegmann Giant Super Markets (formerly Schwegmann Bros. Giant Super Markets and hereinafter called "Schwegmann"), a Louisiana retailer, sued the predecessor of the Dairy Stabilization Board, the Louisiana Milk Commission ("the Milk Commission"),

alleging that the Milk Commission's efforts to regulate Schwegmann's out-of-state purchases of dairy products by attempting to control the prices paid for these purchases were unconstitutional. A three-judge federal court ruled in favor of Schwegmann and the decision was affirmed by this Court. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F.Supp. 1144 (M.D. La., 1973), *aff'd*, 416 U.S. 922, 94 S.Ct. 1920 (1974).

Subsequent to the decision of the Court, Schwegmann entered into an agreement with Dairy Fresh to purchase milk products in Mississippi for importation into and resale in Louisiana. When officials of the Louisiana Health & Human Resources Administration refused to issue a permit to Dairy Fresh authorizing the importation of its products for sale by Schwegmann, Schwegmann and Dairy Fresh brought suit to compel the issuance of the permit. After extensive litigation in the Louisiana courts, the state health officials were ordered to issue the required certificate. *Schwegmann Bros. Giant Super Markets v. Edwards*, 323 So.2d 810 (La., 4th Cir., 1975), *writ denied*, 326 So.2d 503 (La. 1976). Schwegmann began importing Dairy Fresh milk for resale in its stores. As the Dairy Fresh price was substantially lower than the processor prices prevailing in the regulated Louisiana market, this action resulted in lower prices to consumers and ultimately brought about an increase in price competition among the processors and retailers selling milk in the market served by Schwegmann.

3. Regulatory activities of the Dairy Stabilization Board.

In 1975 the Milk Commission was abolished and replaced by the Dairy Stabilization Board. See La. R.S. 40:931.6. The price-fixing powers of the agency were abolished, but the Dairy Stabilization Board retained authority to issue licenses, impose assessments and regulate "[u]nfair methods of competition, unfair or deceptive acts or practices and disruptive trade practices . . . with respect to the sale of milk and milk products." La. R.S. 40:931.8.

The stated purpose of the Dairy Stabilization Law is the establishment of a "program of regulation for the Louisiana dairy industry." La. R.S. 40:931.1(17). The program includes two components. First, the Louisiana Commissioner of Agriculture ("Commissioner") is directed to establish "production marketing areas" within Louisiana and a "production stabilization plan" for each area. *See* La. R.S. 40:931.3-931.4. Second, the Dairy Stabilization Board was created and empowered to promulgate regulations to further the purposes of the Dairy Stabilization Law. La. R.S. 40:931.8. Under the statute, a majority of the members of the Dairy Stabilization Board must be persons engaged in the production, processing or sale of dairy products. La. R.S. 40:931.6. Thus, the statute was designed to permit the persons who participate in the industry to regulate themselves. *Id.*

In March, 1980, the powers exercised by the Dairy Stabilization Board were transferred to the Commissioner. The Dairy Stabilization Board continues to exist, however, in an advisory capacity to the Commissioner. The regulations of the Dairy Stabilization Board are enforceable by the Commissioner. Under the provisions accomplishing the transfer, legal proceedings instituted in the name of the Dairy Stabilization Board are continued in its name. La. R.S. 36:629(g); 36:901 *et seq.*; 36:904. To promote clarity, this motion will refer to the regulatory activities now undertaken by the Commissioner as if they were still the prerogative of the Dairy Stabilization Board.

Section 931.10(B) of the Dairy Stabilization Law makes it unlawful for a processor to sell dairy products to a retailer for resale in Louisiana without being licensed as a processor by the Dairy Stabilization Board. Additionally, each licensed processor is obligated to pay an assessment to the Dairy Stabilization Board. The assessment is based on the weight of milk equivalents used by the processor in processing its dairy products. La. R.S. 40:931.13(B) states:

> In order to obtain funds for the administration and enforcement of the regulations issued by the board pursuant to this Subpart and for the administration and enforcement of that portion of this Subpart for which the board is made responsible, the board shall,

commencing on October 1, 1976, assess each processor licensed by it three cents per hundredweight on all milk equivalents used in the processing of dairy products.

Although the Dairy Stabilization Board characterizes itself as an "antitrust enforcement agency," none of the regulations it enforces resemble the pro-competitive provisions of the Sherman Act. Instead, these regulations are designed to limit the scope of competition in the Louisiana dairy industry by imposing restrictions on the terms of sale. (R., Board Exh. 1). Some of the regulations are patterned after the Robinson-Patman Act and prohibit discrimination among customers in the sale of dairy products, but the regulations limit the terms of sale in other ways as well. (*Id.*, Regs. 13.1.1-13.1.9; 13.1.10, 13.2.13).

For instance, the regulations contain a broad limitation on sales at less than cost. (*Id.*, Reg. 13.1.10). They prohibit the offering of volume discounts without the issuance of a "volume discount eligibility certificate" to the purchasing retailer. Under the regulations and the certificates, the percentage discounts that may be granted by processors are fixed according to a uniform schedule. (*Id.*, Reg. 11.1 *et seq.*). Processors are restricted to "only three authorized methods of delivery," the drop delivery method, dock pickup delivery method, and full service delivery method. (*Id.*, Regs. 13.2.6-13.2.11).

In addition, processors are prohibited from engaging in numerous other activities, including spending "excessive" amounts in entertaining potential customers, making charitable contributions or gifts without prior approval of the Dairy Stabilization Board, using or possessing milk cases belonging to another processor, furnishing free samples except under specified conditions, furnishing signs or other equipment to retailers except under specified conditions, and entering into agreements with retailers relating to billing and services performed by the retailer without prior approval of the Dairy Stabilization Board. (*Id.*, Regs. 13.2.2; 13.2.3; 13.1.19; 13.2.4; 13.1.13-1.14; 14.1).

The Dairy Stabilization Board also enforces regulations that have the effect of limiting extensions of credit by processors to retailers. Each processor and distributor is required to specify a time for payment by customers not later than 15 days after the end of the month of delivery. All "delinquent" accounts must be reported to the Dairy Stabilization Board. In addition, processors and distributors are prohibited from extending credit to a retailer that is more than 30 days delinquent in the payment of any account to a processor, after notice of the delinquency is received from the Dairy Stabilization Board. (*Id.*, Regs. 12.6-12.8, 13.1.18).

The district court made specific findings of fact concerning the function of the Dairy Stabilization

Board. 476 F.Supp. at 418. None of these findings referred to any "antitrust" role of the agency. Instead, the district court found:

> In addition to licensing and assessment authority, the Board is empowered to enforce certain "obligations of licensees" which include such things as requirements for detailed record keeping; regulations as to required time of payment for products sold to retailers; restricted methods of delivery of goods; prohibitions against granting extensions of credit to retailers; prohibitions against spending excessive amounts for entertaining or making charitable contributions or gifts; regulations pertaining to use or possession of milk cases belonging to another processor; and regulations concerning furnishing of samples to consumers or signs to retailers. No distinction is made between in-state and out-of-state processors. *Id.*

As the district court noted, these regulatory activities would apply to out-of-state processors if the Dairy Stabilization Board had the power to regulate out-of-state transactions.

To facilitate the enforcement of its regulations, the Dairy Stabilization Board requires detailed records to be maintained by licensed processors. The applicable regulations require "such books and records . . . as are

necessary for a determination by the Board or its staff as to whether the licensee has complied with the Act, rules and regulations." (R. Board Exh. 1, Reg. 12.11). These records must be maintained for at least 24 months. Processors located outside the state are required to maintain an office within the state in order to facilitate the regulatory examination unless a waiver of this requirement is obtained. All records must be "organized . . . as to facilitate examination by representatives of the Board." (*Id.*, Regs. 12.11-12.13; 12.12).

4. Transactions between Dairy Fresh and Louisiana retailers.

Dairy Fresh Corporation is a Mississippi corporation that owns and operates a milk processing plant in Hattiesburg, Mississippi. Dairy Fresh Ice Cream Corporation is an Alabama corporation that owns and operates a frozen dessert processing plant in Greensboro, Alabama. Neither company has qualified to do business in Louisiana and neither maintains an office within the state. Dairy Fresh has no processing plant, warehouse or other building in Louisiana, solicits no business in Louisiana, maintains no salesmen in Louisiana, and has no employees who are regularly employed in the state. (R., 2; Tr., 38-39).

Dairy Fresh sells dairy products to two Louisiana retailers, Schwegmann and Delchamps, Inc. ("Delchamps"). All of these dairy products are sold and

delivered in Mississippi. Schwegmann and Delchamps transport the dairy products into Louisiana for resale at their retail stores. (R., Stipulations; Tr. 38). Under the agreements between Dairy Fresh and Schwegmann and Dairy Fresh and Delchamps, title passes in Mississippi in all the transactions between the parties. (Tr., 35, 38). Thus, the district court found that the sales occur entirely outside the State of Louisiana. It stated:

> The Court has found, as a fact, that the defendant processors completed the processing of the products here involved in states other than Louisiana, and that the sale of those products took place outside of Louisiana. The mere fact that defendants were aware of the fact that after the sale the products were to be transported into Louisiana for resale by the retailer does not subject the processing activities conducted in Mississippi to tax or assessment by the State of Louisiana. See *American Oil Company v. Neill*, 85 S.Ct. 1130, 1134 (1965). 476 F.Supp. at 419-20.

5. Holding of the district court and the court of appeals.

The decision of the district court, which was affirmed by the court of appeals, does not invalidate any provision of the Dairy Stabilization Law as written. Nor does it prevent the Dairy Stabilization Board from

pursuing any of its regulatory activities within the State of Louisiana. The decision prohibits only the attempts of the Dairy Stabilization Board to impose assessments on and limit the terms of transactions occurring entirely outside the State of Louisiana.

Thus, the district court recognized the right of the Dairy Stabilization Board to impose its regulations, including the provision calling for the payment of an assessment, to "the processing of dairy products in the State of Louisiana . . ." 476 F.Supp. at 420. However, the ruling prohibits the imposition of an assessment when "the products involved are wholly processed outside of Louisiana and are then sold and delivered by the processor to a retailer outside the State of Louisiana." *Id.* at 420. Similarly, it prevents the Dairy Stabilization Board from enforcing its regulations restricting the terms of sale and delivery of dairy products and other activities of processors outside the territorial limits of the state. *Id.* In the words of the Fifth Circuit, the Dairy Stabilization Board has "no power to project its economic regulation — at least insofar as the purpose is to protect local economic interests — to production, processing and sale of dairy products at places without the state." 561 F.2d at 69.

ARGUMENT

The appeal of the Dairy Stabilization Board does not raise any issue that is substantial enough to justify

plenary consideration by the Court. The decision of the court of appeals does not invalidate any portion of the Dairy Stabilization Law on its face. Instead, this holding merely prevents a Louisiana agency from imposing an assessment and restrictive economic regulations on transactions that are consummated entirely in a different jurisdiction. The Dairy Stabilization Board remains unfettered in its regulation of the marketing of dairy products within the State of Louisiana. Thus, the decision has the limited effect of prohibiting the extraterritorial application of the Dairy Stabilization Law.

The decision of the Fifth Circuit is consistent with the holdings of this Court that prevent a state agency from projecting its economic regulations into another jurisdiction. Under the Commerce Clause, a state may not regulate activities occurring in another state in order to ensure the "stabilization" of its own economic market. The arguments of the Dairy Stabilization Board provide no basis for the application of a rule different than that chosen by the court of appeals. Therefore, the decision should be affirmed.

A. The Dairy Stabilization Board May Not Constitutionally Impose Its Assessment Or Regulations On Transactions Occurring Entirely In A Different State.

The Dairy Stabilization Law provides for the imposition of an assessment on the *processing* of dairy

products. La. R.S. 40:931.13 permits the Dairy Stabilization Board to "assess each processor licensed by it three cents per hundredweight on all milk equivalents used in the processing of dairy products." Thus, the attempt to collect an assessment from Dairy Fresh applies to an activity occurring at processing plants located entirely outside the State of Louisiana. In addition, any attempt to regulate the terms of sale between Dairy Fresh and Schwegmann or Delchamps would relate solely to an out-of-state transaction. As the district court found, "the defendant processors completed the processing of the products here involved in states other than Louisiana, and . . . the sale of those products took place outside of Louisiana." 476 F.Supp. at 419.

The attempt of the Dairy Stabilization Board to project its economic regulations into other jurisdictions is invalid under the settled jurisprudence of this Court. For instance, in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 55 S.Ct. 497 (1935), the Court invalidated an attempt by New York to preclude sales of milk within the state when the milk was purchased from a processor outside the state at prices lower than those prescribed under the New York regulatory scheme. In invalidating the provision, the Court started from the proposition that a state cannot, consistent with the Commerce Clause, project its economic regulations into another jurisdiction. It said: "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521, 55

S.Ct. at 499. Thus, the fundamental premise relied on by the Court was the principle that a state may not engage in extraterritorial regulation.

In addition, the Court determined that the New York regulatory scheme was unconstitutional because it had the effect of placing a duty on the importation of milk into the state. The Court stated:

> Imposts or duties upon commerce with other countries, by express prohibition of the Constitution, is beyond the power of a state, "except what may be absolutely necessary for executing its inspection Laws." Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of Congress. "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business." (Citations omitted). *Id.* at 521-23, 55 S.Ct. at 500.

The decision in *Baldwin* was followed in *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Commission*, 365 F.Supp. 1144 (M.D. La., 1973), *aff'd* 416 U.S. 922, 94 S.Ct. 1920 (1974), where a three-judge court held that the attempt of the Louisiana Milk Commission to regulate out-of-state transactions in dairy product was unconstitutional. The decision was affirmed b.

this Court. The Milk Commission had attempted to fix the minimum price of purchases of dairy products by Schwegmann from an out-of-state supplier. The three-judge court held that this attempt to extend regulatory authority outside the state violated the Commerce Clause. It said:

> [W]e further hold that even though Louisiana has the power and the right to regulate the price at which milk products are sold in Louisiana, it has no power to project its regulation into Tennessee by regulating the price to be paid in that state for milk acquired there. *Id.* at 1156.

The court found no particular part of the Orderly Milk Marketing Law to be *per se* unconstitutional, but held that the application of the act to out-of-state transactions was illegal. It stated: "[W]e are of the opinion that the interpretation of the authority granted by that statute is unconstitutional in respect to regulation of purchases made out of state." *Id.*

The *Baldwin* and *Schwegmann* decisions are controlling of the issue in this case. The attempt to regulate the out-of-state sales is an effort to project the authority of the Dairy Stabilization Board into Mississippi. In addition, the assessment is the equivalent of a duty of three cents per hundredweight on transactions occurring outside Louisiana. The efforts to regulate the sales of Dairy Fresh are even more objectionable than the attempts in *Baldwin* and *Schwegmann*, because the Dairy

Stabilization Board wishes to directly, rather than indirectly, assess and establish the terms of the out-of-state transactions. Therefore, the attempt to regulate and assess these sales violates the Constitution.

The attempt of the Dairy Stabilization Board to assess the sales of dairy products by Dairy Fresh is also illegal under the analysis of the Court in *American Oil Co. v. Neill*, 380 U.S. 451, 85 S.Ct. 1130 (1965). In *American Oil*, the State of Idaho attempted to impose a tax on gasoline sales made in Utah to a purchaser for importation into Idaho. The Utah dealer had other contacts with Idaho and was even a licensed dealer in Idaho. Nevertheless, the Court held that the imposition of taxes on the sales would violate the due process clause. The Court found it unimportant that the dealer knew its products would be imported into Idaho by the purchaser. It stated:

> The mere fact that Utah Oil knew that the gasoline was to be imported into Idaho merits little discussion. More than once this Court has struck down taxes directly imposed on or resulting from out-of-state sales which were held to be insufficiently related to activities within the taxing State, despite the fact that the vendor knew that the goods were destined for use in that State. (Citations omitted). *Id.* at 457, 85 S.Ct. at 1134.

Thus, where sales are consummated in another state, they may not be subjected to a duty by the importing state.

The invalidity of the attempt to impose an extraterritorial assessment is compounded by the fact that this action, if approved, would subject Dairy Fresh to the risk of multiple taxation. If Mississippi were to enact an assessment based on the processing or sale of dairy products within Mississippi, Dairy Fresh would be subject to assessment both by Mississippi and by Louisiana, while Louisiana processors would be assessed only once. This *possibility* of multiple levies is sufficient to invalidate the out-of-state assessment. This rule was discussed by the Court in *Central Railroad Co. v. Commonwealth of Pennsylvania*, 370 U.S. 607, 82 S.Ct. 1297 (1962), where a property tax was upheld as to some property but nullified as to other property. The Court said:

> Since the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subjected to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction . . . (Emphasis by the Court). *Id.* at 614, 82 S.Ct. at 1303.

In addition to the authorities establishing that the Dairy Stabilization Board may not project its regulatory authority to another state, at least two cases decided by this Court hold that a company may not even be required to obtain a license to do business from a state unless it engages in conduct in that jurisdiction of a purely intrastate character. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 81 S.Ct. 1316 (1961); *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 95 S.Ct. 260 (1974).

In *Eli Lilly*, the Court held that a license to do business could be required of a company that engaged in purely intrastate activity in New Jersey. Eighteen salesmen operating out of an Eli Lilly office in New Jersey regularly promoting the sales of its products. *Id.* at 280-81, 81 S.Ct. at 1319. These sales were described by the Court as "intrastate sales." *Id.* However, the Court stated that it is "settled" that a certificate to do business cannot be required if the sales are interstate sales, even if salesmen are sent into the state to promote this business. The Court said:

> It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales to New Jersey wholesalers. Under the authority of the so-called "drummer" cases, such as Robbins v. Shelby County Taxing Dis-

> trict Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State . . . *Id.* at 278-79, 81 S.Ct. at 1318.

In *Allenberg*, the Court ruled that a cotton merchant could not be denied access to the courts of Mississippi for its failure to obtain a certificate to do business in the state. The merchant had contracted for the purchase of Mississippi cotton that would be delivered in Mississippi and later shipped in interstate commerce. The Mississippi Supreme Court ruled that the merchant could be denied access to the courts for its failure to obtain a certificate, because its business dealings were purely intrastate in nature. This Court reversed, holding that the purchase of the cotton was "in the stream of interstate commerce." *Id.* at 30, 95 S.Ct. at 266. In holding that a certificate to do business could not be required, the Court said:

> In short, appellant's contacts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a state seeks to require a foreign corporation to do business. *Id.* at 33, 95 S.Ct. at 267.

Dairy Fresh does not engage in any purely intrastate business in Louisiana. To the extent that Dairy Fresh has contacts with the state, these contacts are inter-

state in nature. Therefore, under the authority of *Eli Lilly* and *Allenberg*, Dairy Fresh cannot even be required to obtain a license from the Dairy Stabilization Board.

The sales of dairy products to Schwegmann and Delchamps occur entirely in the State of Mississippi. The Dairy Stabilization Board may not constitutionally impose a duty on the importation of these dairy products, nor may it project regulatory authority into another jurisdiction. Therefore, the decision of the court of appeals is correct.

B. The Dairy Stabilization Board Has Not Raised Any Arguments That Would Justify Additional Consideration Of The Appeal.

The Dairy Stabilization Board fails to raise any contention that would remove this case from the scope of the controlling precedents or justify additional consideration of the appeal. It argues: (1) the out-of-state projection of the assessment and regulations can be justified because the Dairy Stabilization Board is an "antitrust" enforcement agency; (2) the court of appeals improperly applied a "*per se*" test by holding that the assessment and regulations discriminate against interstate commerce; and (3) the decision of the court of appeals is unduly broad. Jurisdictional Statement at 13-24, 10-13, 24-27. None of these contentions has merit.

First, the self-proclaimed role of the Dairy Stabilization Board as an "antitrust" enforcement agency is inaccurate. This agency was created not to promote open competition, but to enforce an "effective program of regulation for the Louisiana dairy industry . . . " La. R.S. 40:931.1(17). The regulations promulgated by the Dairy Stabilization Board are designed primarily to limit competition, including price competition, among dairy processors. If implemented by an agreement among private competitors, rather than a state agency made up primarily of private competitors, the discount-fixing, credit-fixing and delivery-fixing provisions would probably be *per se* violations of the antitrust laws. *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377 (1927); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793 (1948); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925 (1980). Thus, the Dairy Stabilization Board does not serve any "antitrust" function.

Even if the function of the Dairy Stabilization Board could be characterized as serving an antitrust purpose, the projection of the agency's regulations to out-of-state transactions is still not justified. Louisiana has no power to assess or establish the terms of transactions occurring in Mississippi, even if its purpose is laudable. The Dairy Stabilization Board has cited no authority to support the assertion of this extrajurisdictional power. Thus, the decision of the court of appeals is correct.

Second, the decision of the court of appeals does not exclusively rely on an application of a *per se* test or a holding that the regulations of the Dairy Stabilization Board discriminate against interstate commerce. The primary holding of the Fifth Circuit is that "the application of the Louisiana Dairy Stabilization Law and regulations to these out-of-state processors based on the out-of-state sale of their products for resale in Louisiana violates the Commerce Clause . . ." 631 F.2d at 69. This holding that Louisiana cannot project its regulatory power out of state was based on the *Baldwin* and *Schwegmann* decisions reviewed in Section A of this brief. *Id.* The court of appeals did not inflexibly apply a *per se* test, but simply noted the recent holding of this Court that barriers to interstate commerce erected to promote economic protectionism ordinarily are subject to a "virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 620, 98 S.Ct. 2531, 2535 (1978).

Nor can the Dairy Stabilization Board claim that the attempted out-of-state application of its regulations is not economic protectionism. The attempt to impose the assessment is designed to eliminate an advantage now held by the out-of-state processor. Dairy Fresh produces milk in an unregulated jurisdiction where no assessment is imposed. Thus, as the Dairy Stabilization Board told the Fifth Circuit, the application of the assessment is designed to eliminate the "free ride"

otherwise available to the "out-of-state processor." (R., Original Brief for Appellant, Louisiana Dairy Stabilization Board at 38.) Moreover, the application of the other regulations of the Dairy Stabilization Board to the out-of-state transactions would eliminate delivery and pricing methods that have produced competitive prices. Thus, the only purpose of applying the regulations outside the state is to protect local economic interests.

Third, the decision of the court of appeals is not overly broad. The ruling does not invalidate "an entire statutory and administrative program on the basis of a single provision," but instead simply prohibits the Dairy Stabilization Board from regulating transactions in another jurisdiction. (Jurisdictional Statement at 9.) The Dairy Stabilization Law, as written, is still intact. Therefore, this contention of the Dairy Stabilization Board should be rejected.

CONCLUSION

The transactions between Dairy Fresh and Schwegmann and Delchamps occur entirely outside of Louisiana. The Dairy Stabilization Board has no authority to project its regulatory power into another state and impose assessments on these sales. No valid ground has been raised for further consideration of this appeal. Therefore, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that three copies of the foregoing brief have been mailed, postage prepaid, to counsel for the Louisiana Dairy Stabilization Board, Vernon V. Palmer, 7031 Freret Street, New Orleans, Louisiana 70118, M. David Gelfand, 125 Lake Street, No. 12 H-S, White Plains, New York 10603, and C. James Gelpi, Esq., 1007 Maritime Bldg., New Orleans, Louisiana 70130, this ____ day of July, 1981.

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